Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES K. HAHN,
City Attorney of Los Angeles
THOMAS C. HOKINSON,
Senior Assistant City Attorney
RICHARD M. HELGESON,
Assistant City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 367-4580

Attorneys for Petitioners

Volume II of II

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THANE CARL CHEW,

Plaintiff-Appellant,

No. 91-55718

v.

D.C. No.
CV-89-5204-RG(Tx)

DARYL GATES, individually as Chief of Los Angeles Police Department; City of Los Angeles, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; and DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,

OPINION

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge Presiding

Argued and Submitted
August 18, 1992 - Pasadena, California

Before: WILLIAM A. NORRIS, STEPHEN REINHARDT AND STEPHEN S. TROTT, Circuit Judge NORRIS, J., concurring in part and dissenting in part.

Thane Carl Chew was stopped by a Los Angeles Police Department ("LAPD") officer for a traffic violation and identified himself by presenting his driver's license. When the officer returned to his car to check Chew's record, Chew ran away. The officer pursued Chew, who scaled several fences during the chase before ultimately hiding in a scrapyard. During the subsequent search, which involved a number of officers and several K-9 units, Officer Bunch unleashed a police dog named Volker to find Chew. Defendants stipulated for summary judgment purposes that Chew "tried to surrender peacefully once he realized he had been found" by Volker. Defendants' Reply to Plaintiffs

Opposition to Defendants' Motion for Summary Judgment at 2 [hereinafter "Defendants' Reply"]. Nevertheless, Volker seized Chew by biting him hard and holding on to him. Volker was out of Officer Bunch's sight when he located Chew and initiated his attack. Volker's attack left Chew with severe bite injuries on his arm and torso. At the time Officer Bunch released Volker, Bunch knew only that there were three outstanding warrants for Chew's arrest on unspecified felony charges. Officer Bunch had no reason to believe Chew was armed.

The City of Los Angeles and the four individual officers charged with the policymaking responsibility for the LAPD canine policy (then-Chief Daryl

Gates, Captain Patrick Mckinley, and Sergeants Donald Yarnall and Mark Mooring),[1] moved for summary judgment on the ground that the LAPD canine policy was constitutional. In their summary judgment papers, they made no reference to the facts of Chew's seizure by Volker. They merely submitted the LAPD's written canine policy and asked the court to declare it constitutional as a matter of law.[2]

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[1]I use the term "canine policy" to include both the LAPD policy regarding the dogs' training as well as its policy governing the officers' use of the dogs.

[2]See Defendants' Motion for Summary Judgment at 1 ("The policy or procedure sued [sic] by the Los Angeles Police Department to employ police dogs to find and to seize felony suspects who refuse to surrender is not in violation of the Fourth Amendment...."); id. at 8 105 S.Ct. 1699-1700 ("THE POLICY OR PROCEDURE OF

The individual policymaking defendants also argued that they were entitled to summary judgment on the ground of qualified immunity. The district court awarded these defendants summary judgment, which Chew appealed after the jury rendered a verdict in his favor against Officer Bunch.

I

The Constitutionality of the LAPD Canine Policy

A

This appeal requires us to judge the constitutionality of the LAPD canine policy under a well established principle of excessive force law: Deadly force may not be used to prevent

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THE LOS ANGELES POLICE DEPARTMENT IN IT USE OF TRAINED POLICE DOGS IS CONSTITUTIONAL").

the escape of a suspect unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Tennessee v. Garner, 471 U.S. 1, 3 (1985).

In Garner, police shot and killed a burglary suspect trying to escape by climbing a backyard fence. The suspect, Edward Garner, an eighth grader, was 15. He was unarmed. Ten dollars and a stolen purse were found on his body. See Garner, 471 U.S. at 3-4. The issue presented in Garner was the constitutionality of a Tennessee statute that permitted the use of "all necessary means" to apprehend fleeing suspects, whether dangerous or not. Id.

at 4. The Supreme Court held that the Tennessee statute violated the Fourth Amendment insofar as it permitted the use of deadly force to prevent the escape of a felony suspect who "poses no immediate threat to the officer and no threat to others." Id. at 11. In explaining its decision, the Court said: "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape." Id. (emphasis added).

In this appeal, we must apply Garner to decide the constitutionality of a municipal policy which permits the use of police dogs to prevent the

escape of all felony suspects, regardless whether the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3. See Los Angeles Police Department Canine Unit Manual at 5,9,38, 39,41,44,62 [hereinafter "LAPD Canine Manual"].[3]

The LAPD canine policy tracks the Tennessee statute in that it does not differentiate between dangerous and

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[3]The LAPD canine policy explicitly directs that dogs be trained to "seize by biting a concealed suspect who refuses to surrender even if he offers no physical resistance to the dog." Defendants' Reply at 2. Pursuant to that policy, dogs are trained to keep their bite-hold on a suspect unless and until they are called off by their handlers. See Deposition of Don Yarnall at 57, 59-61; Deposition of Daniel Bunch at 26-27; Deposition of Patrick McKinley at 44-46

non-dangerous felony suspects. The only material difference between the LAPD policy and the Tennessee statute is that the statute authorized the use of "all means necessary," whereas the policy authorizes only the use of dogs. If the use of the LAPD dogs constitutes the use of deadly force, Garner would stand in the way of defendants' motion for summary judgment because the LAPD canine policy would be unconstitutional, as the Tennessee statute was unconstitutional, for permitting the use of deadly force to prevent the escape of felony suspects who do not pose "a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3. Accordingly, defendants'

summary judgment motion in its present form must be denied because the critical question whether the use of LAPD dogs, as trained and deployed, constitutes the use of deadly force cannot be decided as a matter of law on the summary judgment record before us.

Deadly force is force that creates a substantial risk of causing death or serious bodily harm.[4] A gun plainly

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[4]See Model Penal Code 3.11(2) (1962) (deadly force is "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm"); see also Mattis v. Schnarr, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (en banc) (using Model Penal Code definition of deadly force); Pruitt v. City of Montgomery, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (same); Ryder v. City of Topeka , 814 F.2d 1412, 1416 n.1 1 (10th Cir. 1987) (same); Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) (same).

qualifies as deadly force. Whether a dog also qualifies depends on how it is trained to behave when confronting a suspect. For example, a dog trained to find a suspect and bark until the dog's handler arrives would plainly not qualify as an instrument of deadly force.[5] But a German Shepherd that is

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[5] Chew stresses that how a dog is trained and used is critical to the determination whether it constitutes a deadly instrument. In his papers opposing summary judgment, Chew distinguishes between two different ways of training and using police dogs: a "find and bark" policy, where dogs are trained not to attack and bite a stationary, non-resisting suspect, but instead to bark until the dog's handler arrives, and a "find, bite, and hold" policy such as the LAPD's. See Chew Opposition to Defendants' Motion for Summary Judgment at 5-9. In fact, Chew has documented how, throughout the 1980s, the LAPD vacillated between these two different policies. According to Chew, beginning in 1980, the LAPD trained its police dogs to find, bite, and hold suspects even if

behaviorally conditioned to go directly for a suspect's jugular would surely qualify as an instrument of deadly force.

Whether a particular instrument of force qualifies as an instrument of deadly force is a question of fact.[6]

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the suspects were stationary and not resisting the dog. In 1984, this policy was abandoned in favor of a find and bark policy used by many other law enforcement agencies. In 1988, the LAPD returned to its original find, bite, and hold policy. See Id. at 5-6. More recently, it has apparently returned to a find and bark policy. See "LAPD Begins Warnings on Use of Dogs," L.A. Times, Sept. 30, 1992, at B3.

[6]See e.g., United States v. Schoenborn, 4 F.3d 1424, 1433 (7th Cir. 1993) (whether an object constitutes a dangerous weapon under 18 U.S.C. 113 is a question of fact that necessarily depends on the particular facts of each case); Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) ("[M]any law enforcement tools possess the potential

for being deadly force. . . . [A]s any faithful reader of mystery novels can attest, an instrument of death need not be something as obviously lethal as a gun or knife. the ubiquitous 'blunt object' kills just as effectively."); United States v. Moore, 846 F.2d 1163, 1166 (8th Cir. 1988) ("The question of what constitutes a deadly and dangerous weapon' [under 18 U.S.C. 111] is a question of fact for the jury.").

State cases are in accord. See, e.g., People v. Fuqua, 58 Cal. 245, 247 (1881) ("There may . . . be cases in which [a weapon's] character. . . depends upon the manner in which it was used, and thus becomes a mixed question of law and fact. In cases of the latter kind the character of the weapon must be left to the determination of the jury, under appropriate instructions."); People v. White, 212 Cal. App. 2d 464,465(1963) (holding that whether any particular instrument constitutes a deadly weapon is "at most a mixed question of law and fact to be determined by the jury upon proper instructions"); People v. Tophia, 167 Cal. App. 2d 39, 47 (1959); People v. Russell, 59 Cal. App. 2d 660,665(1943) ("[I]n determining whether an instrument, not inherently deadly or dangerous, assumes these characteristics, recourse may be had to

Indeed, whether particular dogs trained and deployed qualify as deadly weapons has been uniformly treated as a question of fact for the jury.[7] On the

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the nature of the weapon, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries."); People v. Simpson, 134 Cal. App. 646,651(1933).

[7] For example, in Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991), aff'd without opinion, 961 F.2d 1567 (3d Cir. 1992), the jury was instructed to decide whether or not the use of a dog that caused serious injuries to a fleeing suspect constituted the use of "deadly" force. Id. at 346. After the jury returned a verdict for the suspect, the city moved for judgment notwithstanding the verdict on the ground that the deadly force instruction should not have been given because the weapon used was merely a dog. The district court denied the motion. See id.; see also State v. Sinks, 168 Wis. 2d 245 (Wis.Ct.App. 1992); People v. Nealis, 232 Cal.App.3d Supp. 1 (1991); State v. Bowers, 239 Kan. 417 (1986); People v. Kay, 121 Mich. App. 438 (1982); Michael v. State, 160 Ga App. 48 (1981).

evidentiary record before us, the question whether or not the LAPD dog started to bite and hold suspects, constitute instruments of deadly force is an issue of fact that cannot be decided at summary judgment.

In their summary judgment papers, defendants fail to address this question: whether the dogs they train

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In Nealis, 232 Cal.App.3d Supp. 1, the California Court of Appeals affirmed a conviction for assault with a deadly weapon that involved the siccing of a Doberman Pinscher. The court explained first that "whether a specific dog in a given case is a 'deadly weapon or instrument' is ultimately a question of fact for the jury." Id. at 4. After emphasizing that the conclusion "will depend upon the circumstances of each case," the court reasoned that there was sufficient evidence regarding the viciousness of the dog to support defendant's conviction for assault with a deadly weapon. Id. at 6.

to bite and hold suspects are deadly force. They proffer no evidence whatsoever on the magnitude of the risk that their dogs will kill or seriously injure suspects. They provide no empirical data, for example, showing how frequently LAPD dogs bite the suspects they confront or the seriousness of the injuries suspects sustain when they are bitten. In short, defendants ask us to declare their canine policy constitutional as written without the benefit of evidence on the risk of harm the dogs represent.

In opposing the summary judgment motion, Chew proffered considerable evidence that the LAPD dogs, as trained and deployed, create a substantial risk of serious injury to suspects. He cites

deposition testimony of Sergeant Yarnall that Volker was not trained to grip only a suspect's arm or leg, but instead was trained to bite whatever part of the suspect's body was necessary for an effective hold. See Chew Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 14 (citing Deposition of Yarnall at 33-35). Chew also cites deposition testimony of then-Chief Daryl Gates that Gates was "[v]ery much" aware that Volker, as trained, could maim and even kill a suspect, Deposition of Daryl Gates at 21,[8] as well as testimony of

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[8]In addition, Chew points to deposition testimony of Sergeant Mooring who estimated that suspects suffer bite injuries in over 40 percent of the cases in which police dogs are

Officer Bunch acknowledging that dog bites can be "fatal" or cause "serious and permanent" injuries, Deposition of Bunch at 30-32. Furthermore, Bunch acknowledged that Chew's injuries were "pretty severe," with "serious lacerations." Id. at 126. When read in a light most favorable to Chew, this evidence raises a genuine issue of material fact as to whether the LAPD dogs, as trained and deployed pursuant to the LAPD canine policy, create "a substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2).[9]

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deployed. Deposition of Mark Mooring at 72-75.

[9]Even if it is determined on remand that the use of LAPD dogs such as Volker does not constitute the use

In sum, the Supreme Court held in Garner that by authorizing the use of deadly force against all fleeing felons, the Tennessee statute was based on an anachronistic brightline distinction between felons and misdemeanants. As the Court made clear, the critical factor in determining when the use of deadly force is warranted is not whether the law classifies the suspect's crime as a felony or as a misdemeanor, but whether the suspect poses a significant threat of harm to

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of deadly force, I agree with Judge Reinhardt that defendants would still not necessarily be entitled to prevail in this action. The objective reasonableness of the City's canine policy--as written and as applied to the particular facts of this case--would still turn on a genuine issue of material fact. See Opinion of Judge Reinhardt at 6965-66.

others. See Garner, 471 U.S. at 11, 14, 19-20. The LAPD canine policy relies upon this same outdated and constitutionally irrelevant distinction between felonies and misdemeanors. See LAPD Canine Manual at 5, 9, 38, 62. Thus, if the LAPD dogs, as trained and deployed, constitute instruments of deadly force, then the LAPD canine policy violates the Fourth Amendment in exactly the same manner as did the Tennessee statute because it fails to limit the application of deadly force to those suspects who pose a significant threat to others. Whether the LAPD dogs constitute instruments of deadly force is a genuine issue of fact which precludes summary judgment on the theory advanced by defendants--that the

LAPD canine policy, as written, is constitutional as a matter of law.

C

It is important to make clear that even if the unleashing of Volker constituted the application of deadly force against Chew, it would not have been excessive force if Officer Bunch had probable cause to believe that Chew posed a significant threat of serious bodily harm to themselves or to others. If he had probable cause to believe Chew posed such a threat, the use of deadly force to prevent his escape would have been objectively reasonable under Garner.[10] In that scenario, Chew

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[10]Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

would have no standing to challenge the constitutionality of the LAPD canine policy because he would have suffered no constitutional injury.

Whether Officer Bunch had probable cause to believe Chew posed a significant threat of serious physical harm to others is an issue of fact that cannot be resolved on summary judgment.[11] Officer Bunch knew that Chew was a felony suspect, but the nature of the felonies was unknown. And

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prevent escape by using deadly force." Garner, 471 U.S. at 11-12.

[11]Just as defendants stood mute in their summary judgment papers on the specific issue whether LAPD dogs such as Volker constitute instruments of deadly force, they stood mute on the issue whether Chew posed a threat to others.

after Garner, Chew's suspected felony status alone was insufficient to create the probable cause necessary to use deadly force. See Garner, 471 U.S. at 14 ("[T]he assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."). The evidence in the summary judgment record does not establish as a matter of law that Chew posed any greater threat than Edward Garner did. In neither case did the officer have reason to believe the suspect was armed. In both cases, there was probable cause to believe the fleeing suspect was a felon, but no reason to believe he "pose[d] a significant threat of death or serious physical injury to the officer or others." Id. at 6986. Finally, in

neither case did the circumstances of the attempted escape add anything to suggest that the suspect was dangerous. Garner ran from the home where the burglary was committed through the backyard to a fence, which he had begun to climb when he was shot. Chew made a break for it while talking peacefully to the officer who had stopped him for a traffic violation, jumped several fences, and was hiding in a scrapyard when he was found by Volker. Despite Chew's attempt to surrender peacefully, see Defendants' Reply at 2, Volker seized Chew by biting him repeatedly. On these facts, we cannot grant summary judgment to defendants on the ground that Chew posed the requisite threat as a matter of law any more than we could

have decided that Garner posed the same threat as a matter of law.[12]

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[12]On this issue, Judge Trott engages in appellate factfinding in saying that Chew posed a significant threat of serious bodily harm to others. See Opinion of Judge Trott at 7011-15. Apparently. Judge Trott believes that police have probable cause to believe that anyone with an outstanding felony arrest warrant who flees by jumping fences and by hiding in places such as scrapyards poses such a threat. See Id. at 7014,7029. In support of his factfinding, Judge Trott approvingly quotes the testimony of Sergeant Yarnall, who stated: "You cannot assume that the man is not armed. You will die." Id. at 7013 (citing Deposition of Yarnall at 102). Yarnall's testimony is consistent with the LAPD canine policy which specifically instructs officers to assume that all felony suspects are armed. See LAPD Canine Manual at 41.

However, the position of Sergeant Yarnall, the LAPD Canine Manual, and Judge Trott is inconsistent with Garner, which holds that police cannot automatically assume that all fleeing felony suspects pose a significant threat of serious physical harm to others. See Garner, 471 U.S. at 21 (holding unconstitutional the use

C

In echoing defendants' refrain that the LAPD's canine policy is constitutional as a matter of law, Judge Trott raises the specter that our decision today may lead to "the elimination of the use of police dogs in this circuit to find hiding felony suspects," no matter how the dogs are trained or deployed. Opinion of Judge Trott at 7008-9. To dramatize the importance of well-trained police dogs 10 law enforcement and the public

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of deadly force against a felony suspect not known to be armed who fled the scene of a burglary by scaling a fence). Whether Judge Trott personally believes this Supreme Court law is unsympathetic to the realities of modem law enforcement is irrelevant to our disposition of this appeal.

safety, Judge Trott recounts the story of Pascha, the police dog that helped the LAPD apprehend a career violent criminal known as the "Balcony Burglar." Id. at 7034. However, the heroic story of Pascha has no bearing on the question before us: whether on this record defendants are entitled to summary judgment.

Like Judge Trott, I recognize that Pascha was a great hero. Also like Judge Trott, "I do not believe that the deployment per se of police dogs to find hiding felony suspects is unreasonable." Id. at 7032.[13] However,

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[13]On this point, Judge Trott's reasoning suffers a breakdown in logic. He fallaciously assumes that just because the use of police dogs is not always unreasonable, the use of police dogs is always reasonable. Opinion of Judge Trott at 7032.

I don't buy Judge Trott' s inflammatory rhetoric and doomsday prediction that denying defendants summary judgment will prevent the use of all police dogs in all instances. Lest my opinion be misinterpreted, I emphasize two points.

First, I am not saying that all police dogs, regardless of how they are trained and deployed, constitute deadly force. I am saying only that whether the police dogs, trained by the LAPD to bite and hold, are instruments of deadly force is an issue of fact that cannot be resolved on the summary judgment record before us. There are obviously many ways to train and deploy a police dog so that it is not deadly force, one of which is the "find and

bark" policy that is apparently once again in use by the LAPD. See supra note 5. Whether or not a dog is permitted to roam out of sight of its handler, as Volker was, would be another factor to consider.

Second, I am not saying that the use of a police dog, even if trained to deliver deadly force, is necessarily unreasonable. I am saying only that under Garner, if a dog is trained to deliver deadly force, then the Fourth Amendment requires that its use be limited to those situations where there is probable cause to believe that the suspect poses a significant threat of death or serious bodily harm. In the case of the Balcony Burglar, which involved the pursuit and apprehension

of a person suspected of committing numerous murders, rapes, and robberies, Pascha's use, whether deadly force or not, plainly did not violate the Fourth Amendment.

II

The City's Monell Liability

In resting its summary judgment motion solely on the argument that the LAPD's "find, bite, and hold" canine policy is constitutional as a matter of law, the City conceded that Officer Bunch acted in accordance with LAPD policy when he unleashed Volker to hunt down and seize Chew. See Opinion of Judge Reinhardt at 6968 n.13. On appeal, following the jury verdict that Officer Bunch violated Chew's Fourth

Amendment rights, the City has changed its tune. It now argues that Officer Bunch's actions constituted nothing "more than...a random act or isolated event that resulted in a constitutional rights violation." Appellees' Br. at 31. In other words, it argues that it is not liable for Chew's dog bite injuries because even if Volker's use in this case constituted an unreasonable seizure in violation of the Fourth Amendment, the City was not the "moving force" behind the violation. Id. at 32 (stating that "[t]here is no evidence of any policy to engage in the actions attributed to the officer"). See Monell v. Department of Social Servs. of City of New York, 436 U.S. 658, 694 (1978) (a city is

liable only if the city policy "causes" or is "the moving force" behind a constitutional violation).

The City's appellate position is a 180-degree reversal from its stipulated position below that Officer Bunch's use of Volker to seize Chew complied fully with the LAPD canine policy. I agree with Judge Reinhardt that we must hold the City to the concession it made for summary judgment purposes, see Opinion of Judge Reinhardt at 6967-69,[14] and reject the City's new Monell position--which it takes for the first time on appeal--distancing itself from Officer

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[14]I also agree with Judge Reinhardt that the verdict against Officer Bunch does not moot or preclude Chew's claims against the remaining defendants. See Opinion of Judge Reinhardt at 6953,6955-57.

Bunch's conduct.[15]

III

Qualified Immunity[16]

The individual defendants (Gates, McKinley, Yarnall, and Mooring), who

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[15]On remand, it is inevitable that the City will repudiate the stipulation it made for summary judgment purposes that Officer Bunch released Volker pursuant to LAPD policy. They have already tried to do so on appeal. The City's strategy makes the deadly force issue critically important to the proper resolution of Chew's claims. Under the Garner deadly force analysis, if the LAPD dogs are found to be instruments of deadly force, then the policy itself, insofar as it authorized the use of deadly force against non-dangerous felony suspects, would be unconstitutional. In that event, Officer Bunch's conduct would have been authorized by an unconstitutional canine policy.

[16]Although Judge Reinhardt and Judge Trott constitute a majority on the qualified immunity issue, I refer to the majority opinion as the "Opinion of Judge Reinhardt" for clarity.

had the policymaking responsibility for the LAPD canine policy, argue that even if the policy did violate the Fourth Amendment, they would have no liability for Chew's injuries because they enjoy qualified immunity. The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

A

The doctrine of qualified immunity requires a two-prong inquiry: "1) Was the law governing the official's

conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" Act Up!l Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). The first prong involves a pure question of law for the court to decide, Mendoza v. Block, No. 92-56225, slip op. 5619, 5626-27 (9th Cir. May 31, 1994); the second prong involves a mixed question of fact and law requiring the application of the clearly established law to the facts of the particular case.

1

The first prong of the qualified immunity test requires us to ask whether the Fourth Amendment principles governing the use of police dogs to

prevent suspects from escaping were clearly established at the relevant time. In Mendoza, also a dog bite case, the officers argued that the law governing the use of police dogs was not clearly established because of the paucity of case law specifically addressing the use of dogs in police work. We rejected that argument:

> The deputies argue that the law guiding the use of police dogs at the time Mendoza was bitten was not clearly established. They point to the lack of case law addressing the use of dogs to locate fleeing suspects, and argue that under the circumstances they could not

reasonably have known how to pattern their conduct so as to avoid liability.

This does not mean, however, that there was no clearly established law that would indicate to the deputies that a constitutional right might be violated when using a dog during an arrest. Mendoza argues that the use of a police dog in this case constituted excessive force. Officers have a considerable amount of guidance from the courts in the permissible use of force while making an arrest. It is clearly established that "[t]he use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure." White v.

Pierce County, 797 F.2d 812, 816 (9th Cir. 1986). "The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." Id. This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary for law enforcement officials using police dogs to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that

excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury. See Anderson, 483 U.S. at 640.

We therefore hold that the deputies' use of the police dog is subject to excessive force analysis, and that this law is clearly established for purposes of determining whether the officers have qualified immunity.

Id. at 5628-30 (emphasis added).

Mendoza is controlling authority that the first prong of the qualified

immunity test is satisfied in this case: the use of LAPD dogs is governed by established principles of excessive force law. It is a basic tenet of excessive force law that deadly force may be used only if necessary to prevent the escape of a suspect who poses "a significant threat of death or serious physical injury." Garner, 471 U.S. at 3. Thus, Garner held unequivocally that deadly force cannot be used to prevent the escape of all felons regardless of the danger they pose to others. Deadly force may only be used to prevent the escape of some felons--those who pose a serious threat to the safety of others.

2

The second prong of the qualified

immunity inquiry requires us to apply the clearly established principles of excessive force law to the facts of the particular use of force in this case. Here we must ask whether, in light of the clearly established law governing the use of force, a reasonable officer in defendants' policymaking position could have believed it constitutional to adopt a policy permitting the use of dogs to bite and hold felony suspects, regardless whether they posed "a significant threat of death or serious physical injury to the officer or others." Id. at 6986.

In Garner, the Court held that a Tennessee statute violated the Fourth Amendment to the extent it permitted the use of deadly force to prevent the

escape of felons who did not pose a significant threat of serious harm to others. After Garner, it could not have been clearer to the defendants that the LAPD canine policy was unconstitutional to the extent it authorized the use of deadly force to prevent the escape of felony suspects who did not pose the requisite threat. Because the LAPD policy does not limit the use of police dogs to felony suspects reasonably believed to be dangerous, the question whether a reasonable officer could have believed the LAPD canine policy was constitutional turns on whether a reasonable officer could have believed the use of LAPD dogs such as Volker did not constitute the use of deadly force.

That is a question we cannot decide on the summary judgment record before us. As I have already explained, a genuine issue of fact exists whether the LAPD dogs, as trained and deployed, constitute deadly force. See supra at 6989-91. For emphasis, I will repeat that defendants proffered no evidence in support of their summary judgment motion regarding the danger posed by the LAPD dogs, such as evidence of the type, frequency, and severity of injuries they have inflicted. On the other hand, Chew offered evidence such as the deposition of ex-Chief Gates, who testified that he was "[v]ery much" aware that Volker, as trained, could maim and even kill a suspect. See supra at 6989-90.

Accordingly, because we cannot decide whether a reasonable policymaker could have believed that the LAPD dogs were not deadly force, we cannot decide that defendants are entitled to summary judgment on the ground they rely upon in their motion--that a reasonable officer could have believed the LAPD canine policy was constitutional as written.[17]

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[17]It is important to realize that as policymakers the defendants must be held to a stricter standard of accountability than officers forced to make snap judgments in the heat of battle on today's dangerous streets. We are not addressing here the qualified immunity of a handler who in a split-second decision releases his dog against a suspect who shows a glint of metal in his hand. Instead, we are addressing the qualified immunity of high-level city officials entrusted with the weighty responsibility to study, analyze, draft, and implement an effective police policy that does not violate the Constitution.

B

Defendants' claim of qualified immunity is based almost exclusively on the Sixth Circuit's decision in Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988). In that case, a police dog bit a suspect's neck and killed him, an event that the Sixth Circuit said was an "extreme aberration." Id. at 912.[18] On the record before it, the court held that that particular dog did not constitute deadly force, and that the use of non-deadly force was reasonable

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[18]Although we cannot ignore the fact that, in this case, the use of a police dog did result in a person's death, we also cannot ignore the evidence in the record which indicates that this tragic event was an extreme aberration from the outcome intended or expected." Id.

under the totality of circumstances of the case. See Id. at 912-13. Alternatively, the court held that even if the dog was a deadly weapon, its use would have been reasonable because the suspect "threatened (the officer's] safety and the safety of the other officers present." Id. at 913. Defendants here argue they are entitled to qualified immunity because Robinette was the only relevant federal court of appeals opinion on the books when they adopted the LAPD canine policy.

In Mendoza, we discounted Robinette as authority on the issue of qualified immunity in other dog bite cases because it was "fact-specific." See Mendoza, slip op. at 5629 ("It is therefore questionable whether fact-

specific case law guided the deputies' use of a police dog when they arrested Mendoza."). We did not regard Robinette as an automatic guarantee of qualified immunity to officers in other dog bite cases. Instead, we affirmed the district court's award of qualified immunity because the district court had made a finding of fact, following an evidentiary hearing, that "Mendoza was fleeing arrest for a bank robbery. . . [t]he deputies believed he was armed. . . [and] the deputies could reasonably have believed he posed a danger not only to themselves but also to the property owners." Id. at 5631. Under these findings of fact, the use of police dogs to prevent Mendoza's escape would satisfy the requirements of

Garner even if the dogs constituted deadly force. See Garner, 471 U.S. at 11-12.

My colleagues seem to think that after Robinette, a reasonable officer could have believed it was constitutional to deploy German Shepherds trained to bite and hold even non-dangerous suspects. Implicit in their reasoning is the assumption that it follows, as the night the day, that once a particular dog is judicially determined to be an instrument of non-deadly force, a reasonable officer could believe that no dog is an instrument of deadly force, however trained and deployed.

My analysis rejecting defendants' claim of qualified immunity based on

Robinette is supported not only by Mendoza, but also by Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991), aff'd without opinion, 961 F.2d 1567 (3d Cir. 1992). Because the Marley court applied qualified immunity analysis to the precise issue presented in this case--a claim of qualified immunity based on Robinette--it is instructive to lay out Marley in some detail.

Exactly as in this case, the officer in Marley staked his claim of qualified immunity on Robinette, moving for a directed verdict on the ground that the Sixth Circuit "said that the use of a police dog was not deadly force." Transcript of district court proceedings in Marley v. City of

Allentown, July 2, 1991, at 188-89. The district court denied the motion, and the case went to the jury with the instruction that "[d]eadly force means force that's likely to kill or likely to seriously injure. You heard about the training of the police dog and how it's handled. You need to determine whether or not that was deadly force under that definition." Id. at 200. Following the jury's verdict against the officer, he moved for judgment notwithstanding the verdict, again arguing that he was entitled to qualified immunity on the basis of Robinette.

In denying the motion, the Marley court used the same level of generality we later approved in Mendoza to

determine whether the applicable law was clearly established at the time of the officer's conduct. The Marley court refused to limit itself to police dog cases and instead considered the qualified immunity claim in light of the generic excessive force principles laid down in cases such as Garner. The Marley court cbserved that "[i]n Robinette, the . . . Sixth Circuit merely applied [Garner] to the facts of the case before it" and concluded that there was no Fourth Amendment violation. 774 F. Supp. at 345. The Marley court then explained that the application of Garner to the facts of its dog bite case led to a different result than the result in Robinette. Accepting the jury Finding that the dog

represented deadly force, the court held that in light of Garner, no reasonable officer could have believed it was lawful to use the dog to seize a fleeing suspect who "one could reasonably conclude... posed no threat to the officer." Id.

Marley's qualified immunity methodology--looking beyond dog bite cases to generic principles of excessive force jurisprudence and then applying those principles to the facts of the particular case--is not only correct, it is mandated by our recent decision in Mendoza. Mendoza teaches that under the first prong of qualified immunity analysis, generic principles of excessive force law apply regardless whether the particular instrumentality

of force involves "physical restraint, use of a baton, use of a gun, or use of a dog." Mendoza, No. 92-56225, slip op. at 5024. Garner provided explicit guidance for the LAPD policymakers that if they train dogs to bite and seize suspects in a way that creates a "substantial risk of causing death or serious bodily harm," Model Penal Code 3.11(2), they had better restrict their use to suspects reasonably believed to be dangerous.

Throughout Part IV.B.2 of Judge Reinhardt's opinion, my colleagues scramble their qualified immunity analysis by failing to consider separately the two independent prongs of the qualified immunity test. See supra at 6996,6998-99. They do so

because they fail to recognize that prong one--the "clearly established law prong--raises a pure question of law that does not turn on the particular facts of the case; the facts do not enter into the analysis until we reach the second prong, where we apply the established law--in this case generic principles of excessive force law--to the facts. This analytical flaw is demonstrated by the way they criticize my use of Mendoza and Marley as precedent. See Opinion of Judge Reinhardt at 6977 & 78. I cite both cases as authority that the law governing all excessive force cases, regardless of the instrument used to apply the force, is "clearly established." Indeed, I cite Mendoza

as controlling circuit authority that the first prong of the qualified immunity inquiry is satisfied in excessive force cases by the generic principles established in Garner. Mendoza should foreclose any further discussion on the first prong. In criticizing my limited use of Mendoza and Marley as precedent, my colleagues discuss the facts of those cases, as well as the facts of Chew's case, in a way that injects facts into what should be a pure question of law: "Was the law governing the official's conduct clearly established?" Act Up!, 988 F.2d at 871. The result is a fundamental and far-reaching error in deciding the qualified immunity issue at the wrong

level of generality.[19]

My colleagues also fail to recognize that I make use of Mendoza and Marley as authority that the second

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[19]Compare Opinion of Judge Reinhardt at 6977-78 ("Here, we must determine whether it was clearly established that it was unlawful to use police dogs to search for and apprehend concealed suspects by biting and seizing them.") (emphasis added) with Mendoza, No. 92-56225, slip op. at 5629 ("It is clearly established that '[t]he use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right . . . .' This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. We do not believe that a more particularized expression of the law is necessary. . . .") (citation omitted) and Marley, 774 F. Supp. at 345-46 (the officer "should have been aware of the constitutional constraints enunciated in Garner, and it was not objectively reasonable for him to think that unleashing a trained attack dog" to apprehend this fleeing suspect comporter with Garner.

prong of the qualified immunity test is fact-specific. In Mendoza, the district court granted qualified immunity on the basis of facts it found at a pre-trial evidentiary hearing; in Marley, the jury returned a verdict against the officer. The district court subsequently denied the officer's motion for JNOV. In other words, even though both were dog bite cases, the Mendoza and Marley courts reached different results on the qualified immunity issue by applying established generic principles of excessive force law to the particular facts of the case.[20]

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[20]My colleagues miss the point when they say that Marley could not have guided the Chew defendants in adopting the LAPD canine policy because that case was decided after the

C

Another reason offered by my colleagues for cloaking the policymaking officers with qualified immunity is that the LAPD canine policy was "a longstanding official policy, which was well-known and similar to the policies employed in many police departments throughout the nation, none of which had been judicially questioned." Opinion of Judge

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incident in this case. I do not cite Marley for that purpose; I cite it for its careful analysis of a similar plea of qualified immunity based on Robinette--first, that Marley considered generic excessive force law from cases such as Garner; second, that Marley recognized that particular dogs could be instrumentalities of deadly force and that that fact question is one for the jury; and third, that Marley discounted the value of the fact-specific case of Robinette in its qualified immunity analysis.

Reinhardt at 6978. First, there is no basis in the record for the majority's assertion that the policy was "well-known" and "similar" to other canine policies. Second, an unconstitutional police practice does not metamorphose into a constitutional practice by escaping judicial scrutiny over time. The happenstance that a particular police practice has not yet been "judicially questioned" is meaningless. Since courts do not sua sponte review police practices, the fact that a practice has not yet been "judicially questioned" may simply mean that an actual case or controversy that squarely presents the issue has not found its way into a published opinion.

To give the majority its due, it

at least acknowledges that if a police policy is not "'meaningfully distinguishable'" from a policy that has been declared unlawful, then qualified immunity may not be invoked no matter how widespread and longstanding the policy is. Opinion of Judge Reinhardt at 6979 (quoting Wood v. Ostrander, 879 F.2d 583,592 (9th Cir. 1989)). What the majority fails to explain is how the use of LAPD dogs--trained to roam beyond the handler's control, bite hard, and seize even non-resisting, non-dangerous suspects--is "meaningfully distinguishable" for Fourth Amendment purposes from the use of guns or other deadly weapons against non-dangerous suspects.

From the victim's perspective,

deadly force is deadly force, regardless of whether the force comes from the muzzle of a gun or the muzzle of a dog. Nor does it matter from the perspective of the law. The Fourth Amendment requires that an officer's use of force be reasonable regardless whether the force involves "physical restraint, use of a baton, use of a gun, or use of a dog". Mendoza, No. 92-56225, slip op. at 5024. Garner specifically limits the use of deadly force regardless of the instrumentality used. Garner, 471 U.S. at 31 (O'Connor, J., dissenting) (criticizing the majority's failure "to limit its holding to the use of firearms" only); see also Mathis v. Parks, 741 F. Supp. 567, 572 (E.D.N.C. 1990) ("Garner makes

clear that there are limits to the use of deadly force against arrestees, regardless of the nature of the instrumentality used in applying the force."). Because defendants have failed to produce a scintilla of evidence on the issue of the frequency and severity of the injuries caused by LAPD dogs, I cannot accept my colleagues' unexplained assumption that LAPD dogs such as Volker are "meaningfully distinguishable" from a gun in that they pose no "substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2).

In sum, after Garner, no reasonable officer could believe it lawful to authorize the use of deadly force against suspects who do not pose

"a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3. Accordingly, the individual defendants' claim of qualified immunity must necessarily turn on the factual question whether a reasonable policymaker could have believed that dogs trained pursuant to the LAPD canine policy did not pose "a substantial risk of causing death or serious bodily harm." Model Penal Code 3.11(2). In their motion for summary judgment, defendants stand mute on this question. They merely ask that their policy, as written, be held constitutional as a matter of law. At this stage of the litigation we cannot cloak the individual defendants with

qualified immunity since there is no evidence that would permit us to determine that a reasonable officer could have believed LAPD dogs such as Volker do not constitute deadly force.

CONCLUSION

Defendants are not entitled to summary judgment on the ground that the LAPD canine policy, as written, is constitutional as a matter of law. Furthermore, the City is not entitled to summary judgment on a Monell defense because, for purposes of summary judgment, it admitted to being the moving force behind Officer Bunch's deployment of Volker. Finally, the individual defendants who are responsible for the LAPD canine policy are not entitled to summary judgment on

the basis of qualified immunity.

TROTT, Circuit Judge, Concurring and Dissenting:

My respected colleagues have come to some unsupportable conclusions about this case that are irreconcilable with the real world of police work and its hazards. In so doing, I believe they have inappropriately hobbled the police in this circuit with respect to the use of a valuable tactic in connection with the difficult and perilous task of pursuing and arresting felons who seek to evade arrest by securing themselves in menacing environments. Thus, I am unable to join in the part of Judge Reinhardt' s opinion holding that the initial release of Volker by Officer Bunch constituted a use of unreasonable

force.[1]

At this moment in history, criminals are succeeding in doing what no foreign power has ever been able to accomplish: they have invaded our streets, parks, beaches, and backyards and made many feel like prisoners in their own homes. More and more, criminals are carrying and using firearms. This appalling condition is a matter of common knowledge and concern. As I write this dissent, Mayor Sharon Pratt Kelly of Washington, D.C., our nation's capitol no less, has

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[1]I do concur, however, in the part of Judge Reinhardt's opinion holding that defendants Gates, McKinley, Mooring, and Yarnall are entitled to qualified immunity. Judge Reinhardt's introduction to his opinion characterizes my views.

asked the President of the United States to call out the National Guard to combat crime in her city. The President himself says that violence is "tearing the heart out of America." Jonathan Alter, one of our nation's keenest observers, describes our condition this way:

The paradox of the American gun culture is that it is undermining the very values it was meant to protect. Remember Franklin Roosevelt's famous Four Freedoms? These were what we ostensibly fought World War II over. One of them was "freedom from fear." That battle has been lost. As crime grows arithmetically, fear grows geometrically. Even outside major cities, ours is now a land of real

freedom only during daylight and in certain neighborhoods. We've reached a point in recent years where otherwise optimistic, spontaneous people believe they must constantly peer over their shoulders as if they were being pursued by the secret police in some old communist regime.

This routinized fear is now so much a part of American life that we've begun to take it for granted. We instinctively avoid large sections of cities, using mental maps in our heads that are unavailable to tourists. In my case, it was a stay in Japan that jolted me into recognizing how much freedom I'd lost at home. Japan is crowded and culturally stifling, but it's possible to walk in a park in

Tokyo at midnight without the slightest trepidation, just as it was here as recently as the 1950s. This freedom felt strange to me, as if a state of fear about physical safety is normal. And it is. Barricading oneself at home all night is now natural; wandering around freely and alone--once the quintessential American experience--is foolhardy. Roads like Route 66 once symbolized freedom; they now symbolize danger. Even a timehonored cultural tradition like flipping the bird to some idiot driver is now in jeopardy. Instead of just screaming back, he might blow your head off. Jonathan Alter, There's a War On at Home, Newsweek, Sept. 27, 1993, at 42. Given this climate, the job of a police

officer has never been more difficult, or more dangerous.

Judge Reinhardt finds fault with my interest in relating our decision in this case to the world around us. I do so because I am not comfortable entombed in the purity of abstractions as we decide in Constitutional terms whether a tactic used by the police to apprehend hiding felons is reasonable. I believe that before judges tucked away behind magnetometers and deputy marshals in the safety of courtrooms tell police officers and hiding felony suspects which seizures are reasonable and which are not, we must integrate into our decision making process a thorough understanding of the context of the issue and all the practical

ramifications of our holding, one of which may be the elimination of the use of police dogs in this circuit to find hiding felony suspects. Because of fear of lawsuits and liability, this decision may be fatal to canine units, and by their demise, the ability of police to combat criminals will be seriously hampered. See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1992) ("Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in their unflinching discharge of their duties.'") (citation omitted). Thus, it seems to me that the task of interpreting the principles in our Constitution and applying them

to various conditions and circumstances requires an understanding of human existence that is informed by more than law books.

Furthermore, I do not believe that grounding a holding on this issue in the realities of our times is either "succumbing to hysteria" or "joining the pack." The "pack," as Judge Reinhardt pejoratively chooses to call them, appear to me to include decent people genuinely worried about the world in which they and their children live; and the "hysteria" sounds to me like appropriate concern about their safety threatened by rampaging criminals. I doubt that we serve the People well by dismissing them as an hysterical pack or by telling them that

their elected leaders speaking out on this subject are hypocrites.

Ample precedent exists to support my approach to deciding whether something is unreasonable under the Fourth Amendment. Part of the genius of that amendment is its use of principles that are flexible enough to respond to evolving challenges and conditions. Three examples should suffice to make this point.

When the Supreme Court decided in New Jersey v. TLO, 469 U.S. 325 (1985) that searches of schoolchildren by teachers and administrators shall depend not on probable cause, but "on the reasonableness, under all the circumstances, of the search," id. at 339, the Court relied greatly on

information about contemporary conditions in schools. The Court said, "Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Id. at 339.

The Court used the same approach in Michigan State Police v. Sitz, 496 U.S. 444 (1990) when it decided that sobriety checkpoints to combat drunk driving did not entail unreasonable seizures of motorists. In rejecting arguments that such seizures were unreasonable under the Fourth Amendment, Chief Justice Rehnquist said,

"No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it. Media reports of alcohol related death and mutilations on the nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in

property damage.'"

Id. at 451 (citations omitted). In a concurring opinion, Justice Blackmun observed that "for the period from 1900 through 1969 motor vehicle deaths in the United States exceeded the death toll of all our wars, adding that he was "pleased... that the Court is now stressing this tragic aspect of American life." Id. at 456.

Finally, the Supreme Court ended segregation by race in public schools based on a look at the reality of segregated education, not merely by resorting to theorization. The Court said, "In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted,

Q. How man felony warrants were there?

....

A. You mean when I got arrested?

Q. At that time, yes,

A. One.

Q. Okay. And what was that for?

A. Burglary.

....

Q. Was it a residential burglary, if you recall?

A. Yes.

Q. What about the burglary conviction of October of '88 in Lancaster; was that also a residential burglary?

A. Yes.

....

Q. Okay. And then what happened next?

A. [The officer who stopped me] proceeded back to his car.

Q. What happened next?

A. I lit a cigarette up.

....

A. I remember I was getting scared?

Q. Why were you getting scared?

A. Because I was unaware [sic] of me having a warrant.

Q. And what was the warrant for?

A. My understanding was burglary.

Q. Was it a bench warrant or

an arrest warrant, if you know?

A. That, I'm not sure of.

Q. Did you fail to appear for court?

A. Yes.

....

Q. Okay. So you're aware of one warrant out for your arrest that apprised you of a burglary; is that correct?

A. Yes.

MR. DENNY: [Counsel for Chew.] And his failure to appear for that burglary charge.

....

Q. And the officer went back to his car during that couple seconds?

A. Yes

Q. What happened next?

A. I panicked.

Q. Okay. Because of the warrant?

A. Yes.

Q. And what happened next?

A. I took off running.

Q. Did the officer ever frisk you at any time before he took off running?

A. Not that I remember.

Q. And where did you run to?

A. I think I was running eastbound if my recollection is - that's what I recall the direction.

Q. Did you cross San Fernando Road as you were running?

A. Yes.

Q. No particular place, but eastbound.

Q. How far did you run?

A. Until when?

Q. Until the first time you stopped.

A. Stopped or stopped running?

Q. Till the first time you stopped running.

A. Approximately 2,300 yards.

Q. Okay. And where were you when you stopped running?

A. In the scrap yard.

Q. Were you able to see the officer the first time you stopped?

A. Which officer?

Q. The one who had - you gave your license - who you gave your license to the first officer you saw?

A. I'm not sure.

Q. Did you look to see if he was chasing you?

A. Yes.

Q. And did you see him?

A. I couldn't tell you. I couldn't see him visually, but I saw his police car.

....

Q. When you first started running, what happened?

A. I started to run.

Q. And what happened next?

A. I then took off running towards the, I guess it would

be, southeast direction to the corner of the area that I was in.

Q. What happened next?

A. I was then going to proceed to jump another fence to get into a wash that was nearby.

Q. What happened next?

A. I looked to my right, I guess that would be south, and saw a police car.

Q. What happened next?

A. I then took off running again heading north if my directions are correct.

Q. What happened next?

A. I jumped another fence and proceeded running.

Q. What happened next?

A. I then jumped another fence and proceeded to run.

Q. What happened next?

A. I looked north of the scrap yard I was in at that particular time.

Q. And what did you see?

A. I saw between where the entrance gates come up and I saw what appeared to be a black and white police car driving northbound on Branford Street

....

Q. Okay. What happened next?

A. I then proceeded to run to the entrance gate.

Q. And where was that located?

A. Right there in front of Branford Street.

Q. What happened next?

A. I then approached - came up to the fence and proceeded to climb the fence.

Q. This is a fence on Branford?

A. Yes.

Q. Were you climbing - were you exiting the junk yard or entering the junk yard?

A. I was going to try to exit the junk yard.

Q. Okay. What happened next?

A. As I came to the top of the fence that I was climbing, I saw, if I remember right, two officers looking in the yard

that was - that I just came from, which was right next door.

Q. Okay. What happened next?

A. They both looked up at me or I should say I know of one for sure that looked up at me and saw me.

....

Q. Okay. After you saw the two officers, which you indicated you believe that one of the officers saw you, what happened?

A. I then jumped back into the scrap yard, not junk yard but scrap yard as I know it, and proceeded to run back to where the direction that I saw

the officer - the car drive by on Branford Street.

....

Q. And what happened after you got to the top of the fence?

A. That's when I saw, if I remember right, officers.

Q. Okay. And what did you do then?

A. I jumped down off the fence back into the scrap yard because I saw one officer. Both of them might have looked. I'm not sure. I know one looked up at and so I then jumped back down there.

....

Q. Okay. What happened after

you got to the approximate point of Point F [referring to a diagram]?

A. I then looked - no. That was when I heard what appeared to be a helicopter.

....

Q. Okay. And then what happened?

A. I then looked around.

Q. Okay. And you saw nothing but scrap metal; correct?

A. Yes. You might call it that, yes.

Q. And then what happened?

A. I then proceeded to hide myself.

....

Q. Okay. How did you hide

yourself?

A. I squeezed myself between what appeared to be - if I remember right, four dumpsters; one stacked on top of each other as one pile and the other eight which was one stacked on top of the other one were fairly closed to one another.

....

Q. Hiding. You were hiding between the dumpster for about two hours?

A. Yes, around there, yes.

Q. During those two hours, did you see or hear anything?

A. Yes.

Q. What?

A. A helicopter.

Q. Okay. Anything else? What else?

A. Commotion.

....

Q. Okay. Could you describe this commotion a little bit more, please, that you heard?

A. Well, it appeared to me it sounded like I heard - it sounded like not a regular voice but a voice over either a P.A. system, radio or - I don't know because I couldn't see.

Q. Okay. Okay. You hid yourself at point I and you waited there about two hours; correct --

A. Correct.

Q. -- until you were found;

is that correct?

A. Correct.

....

(emphasis added).

Chew was actively albeit silently resisting arrest. This entire episode was rife with life-threatening "split-second judgments" as the police searched for him. Bunch and Volker were in the yard for half an hour before Volker found him. Yet the majority opinion tries to characterize Chew's behavior as not menacing because he did not do "anything other than hide quietly." With all respect to my good friends, this is a false characterization that makes the event sound like a children's game of hide-and-go seek. The majority's claim that

a hiding quietly Chew posed "no immediate safety threat to anyone" adds new meaning to the word "absurd." Common sense tells us we must look at the circumstances from the perspective of the police, not the hiding suspect.

But perhaps the most upside-down argument in the majority's opinion is the following "syllogism":

1) A police dog is more likely to bite a hidden suspect than one out in the open;

2) Chew managed to conceal himself from the officers;

3) Therefore, Chew deserved to be protected from the dog.

This twisted logic inappropriately removes the responsibility for the increased risk from the suspect and

places it in on the officers, effectively rewarding concealment, resistance, and a refusal to surrender. Chew was responsible for this risk. Are we to call off searches when a suspect conceals himself because the risk of dog bites--or for that matter shootings--is thereby increased?

III

The recurring flaw in the majority's analysis is that it breaks the facts and circumstances of this case into disconnected pieces, gelds the pieces, and then argues that each deodorized piece does not demonstrate Chew was a safety risk. This approach is at war with the requirement that we measure the reasonableness based on the totality of the circumstances. The flaw

is most apparent in the opinion's treatment of (1) Chew's behavior before he panicked ("[N]othing about Chew's appearance or demeanor gave the officer reason to believe he should search [Chew before he fled]."); (2) Chew's behavior in the scrapyard ("The defendants do not suggest that Chew engaged in any threatening behavior during this time, or that he did anything other than hide quietly.") (3) Chew's attempt to resist arrest by wedging himself between the dumpsters ("He did not, however, resist arrest to the point of offering any physical resistance to the arresting officers."); (4) the significance of the outstanding warrants ("[Because] the record does not reveal the type of

felony ..., the existence of the warrants is of limited significance."); and (5) the length of the search ("Chew was trapped in the scrapyard for two uneven hours... ."). (emphasis added).

There are three errors of logic in this piecemeal approach. First, the opinion bases its ultimate conclusion on incomplete and mischaracterized premises. Second, the "no immediate safety threat to anyone" conclusion is tacitly assumed in each premise, i.e., the question is begged by sneaking the rabbit into the hat. Third, the fallacy of composition is mischievously at work insofar as each emasculated and quarantined piece of the whole is used to compel an adulterated and invalid conclusion. If this were a proper way

to reason, which it manifestly is not, one could easily make the case that World War II wasn't really a significant threat to our national security, just as the majority opinion claims Chew's behavior that afternoon did not pose an "immediate safety threat to anyone." No rational jury could so find.

This same kind of analytical mischief is also at work in the manner in which the majority characterizes the LAPD's K-9 policy. Just as the threat posed by Chew's behavior is belittled, the threat posed by police dogs operating under the LAPD 's policy is vastly exaggerated. The majority makes it sound like the purpose of the policy was to "maul" all suspects. This is

untrue, as is the idea that dogs were trained to attack and bite all suspects. The controlling Canine Manual makes it clear that care is taken to minimize the physical danger to suspects:

> "All protection, criminal apprehension and search training shall incorporate control training. Control training includes false starts, outs,[2] and out from attack, call outs, long outs, out while fighting, hold, hold and bark and transports. Great emphasis shall be placed on training as

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[2]An "out" is a command to a police dog to cease whatever the dog is doing and return to the handler.

it will ensure optimum control and will decrease the chances of accidental or unnecessary bites."

Metropolitan Div., Los Angeles Police Dep't., Canine Unit Manual 19-20. The training exercises in the Canine Manual demonstrate that the dogs are trained not to bite when biting is unnecessary, just as officers are trained not to shoot when it is not appropriate.[3]

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[3]These are the control training exercises:

1. Criminal Apprehension (Running)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless 30 yards away from the dog. Upon direction of the evaluator, the decoy shall break and run away from

the dog. The dog shall remain stationary. When the decoy has run 40 yards, the handler shall send his dog. The dog must apprehend the decoy by catching and biting him hard. The dog must bite and hold the decoy until commanded to "out," upon which the dog must immediately release the decoy and return to his handler's heel.

2. Criminal Apprehension (Stationary)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing stationary facing the dog 50 yards away. Upon command, the dog will apprehend the motionless decoy by biting him hard. The dog must bite and hold the decoy until commanded to "out," upon which the dog shall immediately release the decoy and return to his handler's heel.

3. False Start
The dog shall be placed in

a stay facing the decoy. The decoy shall be facing the dog and standing motionless at a distance of 30 yards. Upon direction of the evaluator, the decoy shall break and run away from the dog for 30 yards. The dog shall remain stationary during this exercise.

4. Call Off (Stationary)
The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless facing the dog 50 yards away from the dog. Upon direction of the evaluator, the handler will send his dog to apprehend the decoy. When the dog is within 20 yards of the decoy, the handler shall command his dog to "out." The dog must cease all aggression and return to his handler's heel.

5. Call Off (Running)
The dog shall be placed in a stay facing the decoy. The decoy shall be

standing motionless facing the dog at a distance of 30 yards. Upon direction of the evaluator, the decoy shall break and run away from the dog. The dog shall remain stationary. When the decoy has run 40 yards, the handler shall send his dog to apprehend the decoy. When the dog is within 20 yards of the decoy, the handler shall command his dog to "out." The dog must cease all aggression and return to his handler's heel. The decoy must continue running until told to stop by the evaluator.

6. Suspect Hold (Stationary) The dog shall be placed in a stay facing the decoy. The decoy shall be standing motionless facing the dog at a distance of 30 yards from the dog. Upon command, the dog shall run to the decoy and bark continuously at him. The decoy should remain as still as possible. At this time, the evaluator

may direct the decoy to attack the dog, or direct the handler to call his dog to a heel. The handler must remain standing at his original position during the exercise. Any attack by the decoy shall dictate his apprehension by the dog without any influence from the handler. The dog shall bite the decoy hard and hold the bite until commanded to "out." The dog shall then immediately release the decoy and return to his handler's heel.

7. Hold (Running)
The dog shall be placed at a stay facing the decoy. The decoy shall face the dog standing motionless 30 yards from the dog. Upon direction from the evaluator, the decoy shall break and run away from the dog. When the decoy has run approximately 40 yards, the handler shall command his dog to apprehend the decoy. When the dog is within 50

IV

"To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion'." Tennessee v. Garner, 471

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yards, the decoy shall stop, face the dog, and remain motionless. When the decoy stops, the handler shall command his dog to hold the decoy. The dog must stop within six feet of the decoy and bark at him continuously. The evaluator may then order the decoy to run, attack the dog, or direct the handler to call his dog to a heel. The handler must remain standing at his original position during this exercise.

U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). In this respect, "reasonableness depends on not only when a seizure is made, but also how it is carried out." Id. (emphasis added). The question we must answer is "whether the totality of the circumstances justified a particular sort of... seizure." Id. at 8-9 (emphasis added).

In my judgment, the totality of the circumstances I have outlined thus far are manifestly "exigent" as that concept has been used by the Supreme Court to justify certain exceptional police practices. See United States v. Santana. 427 U.S. 38, 42-43 (1976) (allowing warrantless entry of a home while in "hot pursuit"). The

circumstances most certainly create probable cause to believe Chew "posed a threat of serious harm to the officers or to others. . . ." Tennessee v. Garner, 471 U.S. at 11. In addition to these integrated facts and circumstances that weigh heavily in this balancing process, I also note the following.

First, a biting dog is not a bullet from a firearm. A trained dog is much less dangerous than a shotgun. See Robinette, 854 F.2d at 912 (concluding the use of a properly trained police dog to apprehend a felony suspect does not constitute the use of deadly force). A police dog can inflict fatal wounds, but experience has shown that this is not a common

event. Id. at 913. By comparison, when police shoot, they must always be prepared to accept the possibility of a fatality. Tennessee v. Garner stands as a witness to this reality. Indeed, while we have expended over eighteen months deciding this case, I have heard oral argument in an appeal involving the shooting by police in San Francisco of a recluse engaged in resisting the service of an administrative inspection warrant.[4] The estate of the accused argued in that case that the police should be liable under 28 U.S.C. 1983 for violating the decedent's rights because they entered the decedent's house with firearms when they should

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[4]Alexander v. City and County of San Francisco, No. 92-16751

have used a "less violent alternative," i.e., police dogs. I quote from their brief:

> "If there eventually arose some compelling reason to seize Mr. Quade, police could have employed a canine unit. The San Francisco Police Department has police dogs that are specially trained to search for and discover persons hiding in buildings.
>
> "Police admit that a canine unit was available and could have been utilized. Appellees' own police expert acknowledged that a dog unit was a viable option and would have involved less chance of injury to Mr.

Quade."

No doubt had Chew been shot, his estate would be arguing in this case that dogs should have been used to apprehend him because, of course, dogs represent a "less violent alternative."

Essentially, I agree with the Sixth Circuit:

> "Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often can prevent officers from having to resort to, or be subjected to, such force. Any attempt to apprehend a criminal suspect presents the officer with [a] difficult and

frightening situation, but certainly an attempt to arrest a suspect hidden inside an unfamiliar building during the nighttime presents a particularly confusing one. The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of officers, bystanders and the suspect. Robinette, 854 F.2d at 914 (emphasis added). Searches for hiding suspects are very tense occasions where fingers are appropriately, but dangerously,

near triggers. Accidental shootings are not uncommon.

Second, I see a compelling interest in protecting police from death or serious bodily injury at the hands of holed up criminals. The use of properly trained dogs to seize persons like Chew fosters this interest.

Third, before Los Angeles Police Department K-9 Unit police dogs are released, hiding suspects are given this warning: "This is the police. We are going to use a police dog to find you. There is a possibility you will be bitten by the dog. If you surrender now, the dog will not be used. You have one minute." This gives the suspect control over his own fate. See

Tennessee v. Garner, 471 U.S. at 29 (O'Connor, J., dissenting) ("[T]o avoid the use of deadly force . . . , the suspect need merely obey the valid order. . . .").

Fourth, the massive deployment of police officers required to contain someone like Chew depletes their ranks elsewhere during the many hours that it takes to conduct a painstaking search of a scrapyard. Sgt. Yarnell testified that in an era limited resources and severe budgetary constraints, economic concerns were a factor motivating the K-9 program.

Taking these factors into consideration in their totality, and realizing that all Chew had to do to avoid this fate was surrender, the

scales balance easily in favor of the use of police dogs to assist in these types of seizures. I do not believe that the deployment per se of police dogs to find hiding felony suspects is unreasonable. Thus, I agree with the district court that the release of a police dog to apprehend Chew was objectively reasonable as a matter of law. See Graham v. Connor, 490 U.S. 386,396 (1989). If wanted felony suspects normally surrendered and never attacked police officers, I suppose the result in this case might be different, but that is a fanciful world in which we do not live.

I am not persuaded by the majority's attempt to discredit Robinette v. Barnes, which Judge

Reinhardt suggests was wrongly decided. In Robinette the suspect was hidden in a dark building in the nighttime, but the principle active in Robinette is that a suspected felon hiding from the police may be flushed out by a biting police dog without offending the Fourth Amendment. As Sgt. Yarnell testified, "[D]aylight has nothing to do with it." Darkness aggravates the problem, but daylight does not dispel it. I believe Chew and Robinette stand on equal footing in this context: it was objectively reasonable in both instances to use police dogs to apprehend them. The minimal factual differences between these cases are insufficient to require different results.

What should the police have done to make their conduct reasonable? After Tennessee v. Garner, Chew while running could not be stopped with a bullet. He must be allowed to run. This increases the possibility that he will find a place to hide. Then what? Chew obviously was not going to surrender on his own initiative. His own deposition makes this clear. Nightfall was approaching. It is naive to believe Chew was not buying time until darkness became his ally. Should the police have left their dogs in their kennels and conducted a massive dumpster by dumpster search for Chew before it got dark? Is that the reasonable way to conduct this operation? Were the police required to

maintain their perimeter until they starved Chew out? Should the police have given up and gone home? The Fourth Amendment should not require that we send police into the jaws of danger or permit suspected felons to go on their way. Tennessee v. Garner was intended to protect fleeing nondangerous suspects from gunshots, not to allow them to escape or to endanger the suspect's pursuers or the public.

In my view, the enforcement challenge presented by Chew and the challenge presented by Ronald Mendoza are constitutionally indistinguishable. See Mendoza v. Block, ___ F.3d (9th Cir. 1994). We held in Mendoza that releasing a police dog to find a hiding

felon was objectively reasonable, and we should do so here.

V

It is unfortunate police find it necessary to carry guns and use police dogs. My colleagues are correct: Police dogs can inflict considerable damage on human beings. Nothing I say should be taken for a moment to condone the unprofessional, careless, or inappropriate use of police dogs. A jury in this case returned a verdict for Chew because it believed Officer Bunch went over the line when Chew was finally found. So be it. Police dogs must be well trained, and they must be used appropriately. But in situations like this, the risk of dog bites to menaces like Chew is insignificant in

my judgment when compared to the risk posed to police officers forced to go into deathtraps to search for suspected felons. On occasion, officers misuse guns. Sometimes they misuse batons. But I would not therefore render the use per se of guns or batons unreasonable under the Fourth Amendment, only their misuse.

Police dogs are capable of facts beyond the capacity of human beings, primarily because of their remarkable senses, including the sense of smell. In one well- known case, a police dog named Pascha ended a one-man crime wave by a career criminal dubbed the "Balcony Burglar," a burglar who had terrorized the Westside of Los Angeles County for many years. Pascha's widely

publicized contribution to the safety of the community was heralded in many newspaper articles during January, 1980. The following are excerpts from those articles showing the importance of well trained police dogs to law enforcement and the public.

> "Police this morning cornered and arrested a man they believe is the "Balcony Burglar" -- suspected in three murders, 130 burglaries and numerous rapes -- following a dramatic pre-dawn manhunt near Century City.
>
> "The suspect, identified as Harold Holman, 33, of Los Angeles was taken into custody after being sniffed out and attacked by a Santa Monica police dog.

"Police said Holman was captured about 4:30 a.m., when he was found hiding under a triplex at 2103 Benecia Ave.

"Following his capture, Holman was taken to Los Angeles New Hospital for treatment of bites on his arms suffered when the dog "chewed him up." He was taken to the West Los Angeles Division police station for questioning following treatment.

"Holman was booked at the station in connection with a burglary committed less than an hour before his capture.

....

"The sequence of events leading up to this morning's capture of

Holman began when a prowler entered a second-story residence at 2343 Fox Hills Drive about 3:20 a.m. Neighbors summoned police after hearing the woman resident screaming for help. Officers in one of the patrol cars dispatched spotted a man running across Olympic Boulevard near Benecia about three blocks north from the scene of the break-in. Officers then cordoned off an area bounded by Beverly Glen Boulevard, Fox Hills Drive, Olympic and Benecia and began searching for the suspect.

"A police helicopter was called in and used its powerful flood lights to illuminate the

neighborhood while 15 police officers on the ground combed the neighborhood.

"As the search perimeter was sealed off, the West Los Angeles officers called for help from Santa Monica, where two dogs were being used as part of a special stakeout team looking for the burglar who this week had murdered two people and looted numerous apartments in Santa Monica in recent weeks.

"At about 4:15 a.m., West Los Angeles officers received another call, this one from a woman in the search area reporting a prowler climbing her fence and knocking over trash cans.

"The dogs were brought in, and it was Pascha, a German shepherd handled by officer Barney Melekian, who caught the scent and traced the suspect to a crawlspace under the triplex.

"The animal held Holman at bay, growling and biting the suspect several times on the hands and arms before officers took the man into custody.

SMPD Dog Traps Man in WLA Chase, Santa Monica Outlook, Jan. 18, 1980, at A-1, A-8.

"A grateful public also has been sending its own rewards to Pascha this week. At latest count, seven boxes of dog biscuits have arrived at Santa Monica

police headquarters.

"Melekian took all the congratulations in stride, stressing that it was actually the teamwork among the departments that led to the suspect's capture.

"If West L.A. (police) hadn't quickly sealed off the neighborhood where the suspect was spotted, 'we never would have found him,' said Melekian.

"That comment brought this response from a West L.A. officer: 'Without that dog, we probably never would have found him. If we had, it probably wouldn't have been for several more hours and maybe only after a shooting.'"

....

"So we go over there and the dog 'keys' right away. He follows a scent for about 300 yards, over fences, through yards and alleys. He lost it for awhile out on Beverly Glen, then he picked it up again and took us back through a yard (2103 Benecia Ave.) and to this crawlspace opening. Then he just went bananas."

"I called for other officers to surround the house, then we yelled a warning under the house that we're sending the dog in. We didn't get an answer so we pushed in the screen and the dog went under and I went after him."

Melekian said Pascha found the suspect about 20 feet from the

opening. "The guy tried to kick at the dog, and a fight sorta ensued. He was trying to choke the dog, which may be why he got some sore fingers."

....

"Lt. Glen Ackerman of the West L.A. detective bureau said five or six officers nightly had been working stakeouts during their off-duty hours for about six weeks prior to the arrest.

"That meant cruising streets from 1 a.m. to 6 a.m., after already putting in a full day of work.

"'We had a lot of tired detectives when this was over.' Ackerman said. 'The morning of the

capture was an event of great jubilation over the apparent end of this crime pattern.'

"'This was a case where the dog really proved his worth.' Oswald added as he scratched the docile Pascha behind the ears.

"Pascha 'doesn't know this guy was so important.' Melekian said, with Pascha lying at his feet like a 105-pound puppy. 'He was just doing his job, like with the other 70 or 80 guys he's gone after.'

....

"Being a hero is nothing new for Pascha. He received the Police Department's Merit of Valor in 1978 for his efforts to control a robbery suspect who had attacked

an officer."

Mike Tipping, A Parry for Pascha, Santa Monica Outlook, Jan. 26-27, 1980, at A-1, A-4.

> "It was a classic police operation in almost every respect. The LAPD helicopter kept the man pinned down while the patrol cars on the perimeter prevented his escape. All that remained was for Pasha [sic] to come in from Santa Monica to track the man down.
>
> "As it turned out, the suspect had run under my bedroom window to a building two houses down, pulled open the screen cover leading to a crawl space under the house, replaced the screen, and inched his way about 30 feet under the

house.

"It's possible that if Pasha hadn't picked up the scent, somebody might have found him but just about everybody involved said the odds were greater that they wouldn't have found him. Even if they had, considering that he was armed with a .38 pistol, it most likely would have turned out to be a major SWAT operation.

....

"Since he started his career as a police dog, Pasha has assisted in more than 300 felony arrests. He's found about 50 crime suspects who were doing their best not to be found, and he's only bitten 19 of them.

"That's mainly because Melekian does his best to discourage him from chewing up criminals.

"Actually, there's no malice in Pasha. Melekian explains. Biting people is sort of a game, like catching a Frisbee is for other dogs.

"The rules of the game, basically are, that Pasha can't bite anybody unless Melekian orders him to or they try to attack Melekian or another officer, or--and this is the key rule--they try to move after Pasha has sniffed them out.

"If a burglar, for example, is discovered by Pasha hiding in a building, the dog most likely will

simply bark and stand guard, perhaps placing his mouth ever so gently on the suspect's arm. If the suspect stands perfectly still, there's nothing to worry about.

"But one move and Pasha is free to bite. In training, that's a reward and it works the same way in real situations, although Melekian says Pasha never bites any harder than the 'level of resistance' he encounters.

"'Of the 19 people he's bitten, 12 had guns.' Melekian says, 'We train the dogs to go for the arm. If somebody tries to kick him, he'll take the leg. But its a myth that they go for the throat.

The most serious injury he's caused was a broken arm.'"

William Overend, Pasha the Wonder Dog, Force's Finest German Shepherd Gets His Man, L.A. Times, Jan. 31, 1980, 4, at 1,8-9.

As our streets and communities become more dangerous, and as the police come under increasing fire from criminals, it is a tragic mistake for this court to send police dogs to the sidelines in favor of sending in officers to flush out hiding felony suspects like Chew. I repeat Melekian's words: "Of the 19 people [Pasha has] bitten, 12 had guns." The irony in this case is the unstated assumption of the majority that a hiding suspect is in less danger from officers carrying

firearms than from a police dog. This assumption may be far from accurate.

Without police dogs, the police might still be looking for the Balcony Burglar, Ronald Mendoza, or for that matter, Thane Carl Chew himself. Police dogs by themselves certainly won't solve all our problems, but at least they will protect and help keep alive the officers we pay to catch those dangerous criminals who violate our laws. Such protection is hardly unreasonable. I doubt as Judge Reinhardt claims that using police dogs to flush out hiding felony suspects is the "beginning of the police state and the end of freedom." The decision to establish a K-9 Unit to locate hiding suspected felons should be left to the

governmental process. As a matter of policy, the executive and legislative branches of local government can arrive at an informed conclusion, just as they have with the use of guns, tasers, batons, and chokeholds. As in Los Angeles, a police chief, an elected mayor, a police commission, and an elected city council are best positioned to make these decisions and to determine the needs and overall interests of the community.

CHEW v. GATES APPENDIX C

ORDER DENYING PETITION FOR REHEARING
AND REJECTING SUGGESTION FOR REHEARING
EN BANC

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
August 30, 1994
Cathy A. Catterson, Clerk
U. S. Court of Appeals

THANE CARL CHEW,	No. 91-55718
	D.C. No. 89-5204
Plaintiff-Appellant	RG(Tx)
v.	ORDER
DARYL GATES, individually and as Chief of the Los Angeles Police Department; CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California; and DANIEL BUNCH; DONALD YARNALL; MARK MOORING; PATRICK McKINLEY; DOES 1 through 10, 14, 16 through 20, inclusive, each individually and as a Los Angeles Police Officer,	
Defendants-Appellees.	

Before: NORRIS, REINHARDT, and TROTT, Circuit Judges

Judge Norris has voted to deny appellees' petition for rehearing and recommended rejecting the suggestion for rehearing en banc. Judge Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Trott voted to deny the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CHEW v. GATES APPENDIX D

FEDERAL CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Civil Rights Act of 1871, 42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Acts of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.